IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 445 of 2000
IN
COMPANY PETITION No 121 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

O.N.G.C. LTD.

Versus

O.L. OF AMBICA MILLS CO. LTD.

Appearance:

1. COMPANY APPLICATION No. 445 of 2000
MR KAMAL TRIVEDI, SENIOR COUNSEL AND
ADDL.ADVOCATE GENERAL WITH MR KM THAKAR
FOR M/S TRIVEDI & GUPTA AND
MR AJAY MEHTA for Applicant - ONGC.
MR ASHOK L SHAH for Respondent No. 1
MR JT TRIVEDI for Respondent No. 2
MR BJ TRIVEDI for Respondent No. 2
NOTICE SERVED for Respondent No. 3-7,9
MR MRUGESH JANI for Respondent No. 4
SINGHI & CO for Respondent No. 8
MR DS VASAVADA for Respondent No. 10

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 1/10/2004

CAV JUDGEMENT

1 This application by way of Judge's Summons is moved by Oil and Natural Gas Corporation Limited (hereinafter referred to as 'ONGC') praying for following reliefs :

(A) That this Hon'ble Court may be pleased to direct the respondent herein to make payment to the applicant herein viz. Oil and Natural Gas Corporation Ltd., a Government of India Undertaking ("ONGC" for short) towards the outstanding dues amounting to the tune of Rs.1799.367 lakhs, as on 28.02.98 (with further interest thereupon till the date of payment/till the date of realisation) for Natural Gas supplied to M/s.Ambica Mills Company Limited (in liquidation) i.e. the Company (in Liquidation).

(B) That this Hon'ble Court may be pleased to grant an injunction restraining the respondent and/or his agents, officers, servants from making any payment/disbursement in any manner out of any of the sale proceeds that are available from the sale of assets/properties of the M/s.Ambica Mills Company Ltd. (in liquidation) hereinafter referred to as "the Company (in Liquidation),

(C) That this Hon'ble Court may be pleased to grant an injunction restraining the respondent herein, and/or his agents, officers, servants from creating any charge, encumbrance, alienation and/or disposing off the immovable assets of the company (in liquidation) which are presently in charge of the respondent,

(D) That this Hon'ble Court may be pleased to direct the Respondent to make payment of Rs.22.52 Lakhs (being the initial instalment deposited by the purchaser of

Plot No.307 TPS-16 belonging to M/s.Ambica Mills Company Limited (in liquidation) which has been disposed off for Rs.90.11 Lakhs) to the ApplicantONGC pursuant to the order passed by the Hon'ble Supreme Court which are annexed hereto with the Affidavit in support of Judges Summons filed by the Applicant-ONGC,

(E) That such other and further orders and directions as may be deemed fit and proper may be passed in favour of the applicant herein".

Originally, when the application was moved there was only one respondent viz. Official Liquidator of M/s.Ambica Mills Co.Ltd., (in liquidation). Thereafter, the applicant was permitted to join Secured Creditors as party respondents by the Court by its order dated 06/12/2000. On 27/02/2001 a statement came to be made on behalf of the Secured Creditors/Workmen that a Review Application was pending before the Hon'ble Apex Court regarding the alleged claim of the applicant ONGC. Thereafter, the matter was adjourned from time to time and on 09/04/2002 the Official Liquidator was directed not to disburse any amount till disposal of the Review Petition.

2 The learned Addl.Advocate General placing heavy reliance on the order dated 15/04/1987 submitted that the said order was followed by orders dated 06/04/1993, 17/10/1997 and 26/07/2001 which unequivocally established that ONGC was a Secured Creditor in relation to its dues arising out of gas supplied to the Company in liquidation. It was submitted that in all there were 18 orders passed, as compiled and filed along with affidavit dated 15/09/2004. That after ONGC succeeded in appeals before the Hon'ble Supreme Court it staked its claim in case of various Companies in liquidation by moving various applications before this Court or getting itself impleaded in various applications moved by Textile Labour Association or Secured Creditors seeking disbursement of funds realised by Official Liquidator from the assets of various Companies in liquidation including Company in liquidation in the present application. That the present application and various other applications were kept pending by this Court awaiting outcome of the Review Petition preferred by Textile Labour Association.

3. The Review Petition preferred by the Textile Labour Association has thereafter been decided by the

Hon'ble Apex Court on 12/04/2004 and the said decision is reported as Textile Labour Association and Another Vs. Official Liquidator and Another (2004) 9 SCC 741. In light of the said decision the learned Advocates appearing for the respective parties have made their submissions : On behalf of the Workmen and the Secured Creditors it was submitted that ONGC has no right to stake a claim and the application requires to be rejected as ONGC is neither a Secured Creditor nor does it have any preferential right, over the claims of the Secured Creditors and the Workmen. On behalf of ONGC it was submitted that considering order dated 15/04/1987 of Hon'ble Supreme Court in Misc. Petitions Nos. 7875 of 1987 to 7885 of 1987 in Civil Appeals No.8530 of 1983 to 8540 of 1983 ONGC was a Secured Creditor like any other Secured Creditor and it had a preferential right; in light of the subsequent order dated 6/4/1993 its right was absolute. It was further submitted that the Official Liquidator had moved Review Application being I.As.No. 168 of 1997 to 178 of 1997 in Civil Appeals No.8530 to 8540 of 1983 and by virtue of order dated 17/10/1997 made by Hon'ble Supreme Court therein the dues of ONGC are required to be paid off first and the question of making any payment to any other creditor can arise only out of the surplus, if any, remaining after the full dues of ONGC have been paid off.

4. In light of the aforesaid submissions Mr.Sandeep Singhi, learned Advocate appearing on behalf of Industrial Credit And Investment Corporation of India Ltd. (ICICI), one of the Secured Creditors, raised a preliminary objection that the present application filed by ONGC was limited in its prayer regarding direction to the Official Liquidator to make payment and the Court should not decide as to whether ONGC was or was not a Secured Creditor. Mr.K.B.Trivedi, learned Senior Counsel and Addl.Advocate General appearing on behalf of ONGC submitted that the application was filed in 2000 i.e. at a point of time when judgment dated 12/04/2004 in the case of Textile Labour Association (supra) was not available. That in light of findings recorded in paragraph No.11 of the said judgment it was necessary that the said controversy should be resolved and the applicant was specifically requesting the Court to decide the same. It was submitted that he was making a statement under instructions.

5. A brief resume of historical facts. ONGC in the course of its business of marketing and supplying industrial gas to various consumers made supply of natural gas to the Company in liquidation. It appears

that some time in 1979 when the contract entered into by ONGC with various gas consumers was to expire, ONGC revised the price upwards and as a consequence dispute arose in relation to the price of gas to be charged by ONGC since 1979 onwards. The gas consumers of ONGC formed an Association viz. Association of Natural Gas Consumers Industries and filed a writ petition in this High Court. The High Court by an interim order directed ONGC to supply gas at the old rate of Rs.504/- per 1000 cubic metres. Subsequently by order dated 29/10/1982, the High Court increased the interim price to Rs.1000 per 1000 cubic metres. The petitions came to be decided by the High Court on 30/07/1983 and the enhanced price sought to be charged by ONGC was not approved and the writ petitions came to be allowed. ONGC filed appeals before the Hon'ble Apex Court and by interim orders ONGC was directed to supply gas at Rs.1000 per 1000 cubic metres. Thus, in effect the interim orders made by the High Court continued to remain in operation. By judgment dated 04/05/1990 the Hon'ble Supreme Court upheld the price fixation by ONGC and allowed the appeals filed by ONGC. The said judgment is since reported at 1990 (Supp) SCC 397.

6 During pendency of appeals on 15/04/1987 Hon'ble Apex Court passed an order directing ONGC not to disconnect the supply of gas to the consuming industries subject to an undertaking to be filed by the consuming industries that the said consumers will not charge, encumber or alienate, except with the leave of the Apex Court, any of their immovable assets, included in the respective undertakings and that the consumers will make their immovable assets, available for discharging the respective liabilities on account of the difference in the price of all the gas supplied during the pendency of the appeals as determined by order made by the Court while disposing of the appeals.

7 In the judgment rendered in case of Textile Labour Association (supra) the petitioner before the Hon'ble Supreme Court contended that the petitioners were not parties to the proceedings before the Supreme Court and on passing of the winding up order on 17/01/1997 the provisions of the Companies Act,1956 (hereinafter referred to as 'the Act') will come into force and will be effective in light of the decisions of the Supreme Court in case of UCO Bank Vs.Official Liquidator, High Court, Bombay (1994) 5 SCC 1, Industrial Credit And Investment Corporation of India Ltd. Vs. Srinivas Agencies and others, (1996) 4 SCC 165, Allahabad Bank Vs. Canara Bank and Another, (2000) 4 SCC 406, A.P.State

Financial Corporation Vs. Official Liquidator, (2000) 7 SCC 291. On behalf of the petitioners it was submitted that order dated 17/10/1997 was required to be recalled and/or modified. The order made by the Hon'ble Apex Court on 17/10/1997 reads as under :

"All that is necessary to be said is that out of the assets of the Company under liquidation, the dues of ONGC Ltd., are required to be paid off first and the question of making any payment to any other creditor can arise only out of the surplus, if any, remaining after the full dues of ONGC Ltd. have been paid off. The High Court is, therefore, to proceed with the matter in this manner. IAs stand disposed of."

On the basis of the aforesaid order ONGC had staked its claim seeking to be paid off first and, hence, the Review Application was moved by the Textile Labour Association.

8. On behalf of ONGC, at the hearing of the Review Petitions it was contended that once the Hon'ble Apex Court had issued mandamus as to priority of claims in the matter of payment such mandamus will prevail over any law. The Apex Court negatived the said contention and in paragraph No.11 stated that :

" xxx order made by this Court on 17/10/1997 in IAs Nos.168-78 of 1997 in Civil Appeals Nos.8530-40 of 1983 will have to be read subject to provisions of Sections 529 and 529-A of the Companies Act".

It is this direction which has given rise to the present controversy between the parties.

9. The learned Addl.Advocate General submitted that:

[1] By virtue of various orders of Supreme Court from 15/04/1987 ONGC has been treated as a Secured Creditor.

[2] The very orders of the Supreme Court seek to confer preferential position to ONGC in recovery of its dues.

[3] Without prejudice, in any event ONGC has to be given preferential treatment in the matter of

recovery of its dues over all Financial Institutions who claims to be Secured Creditors and,

[4] None of the orders commencing from 06/10/1983 to 26/07/2001 are set aside by the Supreme Court while deciding the Review Petition filed by TLA, the only order which is disturbed is order dated 17/10/1997.

In support of the aforesaid propositions the learned Addl. Advocate General submitted that ONGC was compelled to supply gas by interim orders but the same was with a rider. That by interim orders the Consumer Industries were permitted to get supply subject to the undertaking to be filed by them. Therefore, but for the conditional order ONGC would not have supplied the gas or the supply would have been at the price fixed by ONGC. The supply therefore was under aegis of the orders of the Supreme Court and the recovery of its dues was virtually assured through the process of the Court. That the effect of such conditional orders was to create a definite security in favour of party for its protection and, hence, ONGC was entitled to be treated as secured creditor in terms of Sections 529 & 529A of the Act.

9.1 That by order of 6/4/1993 Supreme Court had laid down the mode and the manner in which ONGC was entitled to recover amounts due to ONGC from various industries including Company in liquidation. That as already seen, even by subsequent order of 17/10/1997 ONGC was to be paid off first and therefore on a conjoint reading of various orders passed by the Supreme Court the right of ONGC to recover its dues was absolute and unfettered; it was a right akin or superior to the right of a Secured Creditor. That such right could not be taken away or whittled down by anything, much less an act whereby the Company has been ordered to be wound up for its inability to discharge its liabilities. Thus, the right as contemplated under Sections 529 & 529A of the Act cannot undo the right which had crystallized in favour of ONGC by virtue of the orders of the Court.

9.2. That even otherwise ONGC cannot be equated with either Secured or Unsecured Creditors as the act of supplying gas was not of free volition but under orders of the Court.

9.3 Alternatively, it was pleaded that ONGC was entitled to be treated at par with a Secured Creditor and thus entitled to prorata share from the amount which was

available for disbursement.

9.4 A further alternative contention was that right of ONGC was equivalent to the right conferred on the Workmen by virtue of provisions of Sections 529 & 529A of the Act and it be held that ONGC was entitled to pari passu distribution from the funds available with the Official Liquidator.

9.5 Strong reliance was placed on definition of the term "Secured Creditor" by referring to Stroud's Judicial Dictionary, Fifth Edition Volume 5, Black's Law Dictionary, Sixth Edition, P.Ramanatha Aiyar's The Law Lexicon, 2nd Edition 1997. It was submitted that the Act did not contain any definition of Secured Creditor and hence as per provisions of Section 2(e) of The Provincial Insolvency Act,1920 which defines -'Secured Creditor': means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor" That as per the said definition, even if for a moment it was stated that there was no charge or mortgage in favour of ONGC on the properties of the Company in liquidation at least there was a lien considering the undertaking filed before the Apex Court and hence ONGC was a Secured Creditor.

9.6 The learned Addl.Advocate General urged that ONGC be held to be a Secured Creditor entitled to seek prorata distribution along with other Secured Creditors and/or Workmen in light of the provisions of Sections 529 and 529A of the Act.

10 Mr.J.T.Trivedi, learned Advocate appearing on behalf of Bank of India i.e. one of the Secured Creditors, submitted that Bank of India had also filed a Review Petition in the Supreme Court of India and there were number of Review Petitions filed by different Secured Creditors. This submission was made in context of the contention raised by learned Addl.Advocate General that a Review Petition filed by ICICI came to be dismissed as withdrawn on 16/10/2001. Mr.J.T.Trivedi submitted that Review petition being I.As.No.300 to 310 of 2002 were filed by Bank of India and the same came up for hearing on 21/01/2003 wherein notice has been issued and thereafter ONGC has been granted time to file reply. It is stated that the said Review Petition is pending as on today. Affidavit dated 20/9/2004 of Shri K.K.Nair, Assistant General Manager, Ahmedabad Recovery Branch has been placed on record.

10.1 Responding to the submission regarding undertaking having been filed by the Management of the Company in liquidation at the relevant time before the Apex Court it was submitted by Mr.J.T.Trivedi that the property in question was already under charge created in favour of the Secured Creditor and if there was any failure/deficiency in filing the said undertaking, it was at the end of the person who filed such an undertaking, in not disclosing the pre-existing charge in relation to properties of the Company in liquidation. In the circumstances, even if ONGC was to be treated as a Secured Creditor a question as regards priority would arise : As to who amongst Secured Creditors is the first charge holder and who is the next in queue.

10.2 It was further submitted that the Legal Maxim "ACTUS CURIAE NEMINEM GRAVABIT - which means an act of the Court shall prejudice no man was applicable in case of not only the Workmen but also the Secured Creditors. That the Apex Court could not have passed an order, in a litigation emanating from a contract between ONGC and its Consumers, so as to cause prejudice to third parties viz. the Secured Creditors. This was in fact according to Mr.J.T.Trivedi made clear by the Apex Court when it observed in paragraph No.7 of its judgment rendered on 12/04/2004 in the case of Textile Labour Association (supra), that exercise of power under Article 142 cannot ignore any substantive statutory provision dealing with the subject and the exercise has to be so as to do complete justice between the parties.

10.3. Mr.J.T.Trivedi further submitted that all the preceding orders merged into the last order dated 12/04/2004 and hence also ONGC was not entitled to stake a claim on the basis of any of the previous orders which now no longer independently survive.

10.4. That even otherwise, ONGC was not entitled to state that it was a Secured Creditor in light of specific provision of Section 125 of the Act. Elaborating on the said submission he contended that any charge which is not registered as stipulated under Section 125 of the Act was void against the Liquidator and any Creditor of the Company. That ONGC had not been able to point out as to whether the so called charge, on the basis of which it was claiming preference as a Secured Creditor, was registered or not, and in light of such failure ONGC should not be treated as a Secured Creditor. In this context Mr.J.T.Trivedi invited attention to the use of the words "if any" in paragraph No.10 of the Judgment dated 12/04/2004 in the case of Textile Labour

Association (supra) rendered by the Apex Court to contend that the said words had been used to denote that claims of ONGC had to be worked out in accordance with Sections 529 & 529A of the Act subject to the claims being in accordance with and fulfilling statutory requirements. That reliance by ONGC on the definition of the term "Secured Creditor" from various legal dictionaries could not assist the case of ONGC when there was a statutory requirement under Section 125 of the Act.

10.5. Lastly reliance was placed on case of Allahabad Bank Vs. Canara Bank and another, AIR 2000 SC 1535 to submit that Secured Creditor has an option to remain outside winding up proceedings and in such circumstances Secured Creditor is required to permit the Liquidator to enforce the charge on the security of the Secured Creditor to the extent of the Workmen's portion and the term "workmen's portion" had been defined in Section 529(3)(c) of the Act. That if the aforesaid principles are applied, ONGC has no right to claim any portion qua the security of the Secured Creditor when such a Secured Creditor has remained outside winding up, in absence of any statutory provision.

11. Mr.D.S.Vasavada, the learned Advocate appearing on behalf of Textile Labour Association submitted that order dated 17/10/1997 made by the Apex Court was in the Review Application filed by the Official Liquidator wherein the Workmen and the Secured Creditors were not joined as a party; and hence the need for preferring the Review Application by the Textile Labour Association which came to be decided by the Apex Court on 12/04/2004 in the reported decision in case of Textile Labour Association (supra).

11.1 That even if the entire bunch of orders compiled by ONGC are taken into consideration all that the said orders show and establish is that ONGC was a supplier of gas, there was a dispute between ONGC as a supplier and its consumers and whether in light of the terms of the contract between ONGC and its consumers ONGC was entitled to any higher price for the gas supplied by it. In support of the submission he invited attention to order dated 26/07/2001 made by the Apex Court permitting ONGC to charge and recover interest on its unpaid dues on the basis of clause Nos.5.01 and 5.02 of the contract between ONGC and its consumers. It was further submitted that the orders were made by this Court and the Apex Court in Writ Petitions filed by the Consumers and appeals filed by ONGC. In the entire litigation the workmen and the

Secured Creditors were never involved.

11.2 Mr.Vasavada placed heavy reliance on paragraph Nos. 7 and 8 of the judgment dated 12.04.2004 in the case of Textile Labour Association (Supra) to contend that the Apex Court had not only not issued any mandamus as was being claimed by ONGC but it had made itself very clear that there was no mandamus and the earlier order dated 17/10/1997 of the Apex Court was to be read subject to provisions of Sections 529 & 529A of the Companies Act. That if the provisions of Sections 529 & 529A of the Act are read together and applied to the facts of the case it was apparent that ONGC was not a Secured Creditor.

11.3 That even if it was accepted for the sake of argument that ONGC was a 'State' within the meaning of Article 12 of the Constitution of India it could at best claim to be a Statutory Creditor, or an Authority but by no means it was a Secured Creditor as understood within the meaning specifically applicable under the Act. That even if it was treated as a Statutory Creditor the claim of ONGC would fall under Section 530 of the Act and hence, there was no reason to give any priority to ONGC.

12. Mr.Sandeep Singhi, learned Advocate appearing on behalf of ICICI Bank Limited raised a preliminary contention that considering the prayers for reliefs made in Judge's Summons the Court was not required to decide as to whether ONGC was or was not a Secured Creditor.

12.1 Mr.Singhi submitted that ONGC was claiming priority on the basis of order dated 17/10/1997 which now no longer survives in light of the subsequent order of 12/04/2004 and both the orders were made by the Apex Court and if any party, including ONGC, had any doubt the proper Forum for seeking a clarification was the Apex Court.

12.2 It was further submitted that once the respondents were joined as party respondents on the basis of being Secured Creditors, it was not open to ONGC to raise any dispute at this stage and ONGC was only required to succeed or fail on the basis of the evidence it could lead in support of its claim for being given priority at the time of disbursement. This submission was in response to stand of ONGC that the Secured Creditors had not placed on record the details of any charge in favour of the Secured Creditors.

12.3 Mr.Singhi emphatically submitted that the various orders of Supreme Court on which reliance has been placed on behalf of ONGC, will have to unequivocally show that ONGC is a Secured Creditor and that ONGC had in fact not been able to point out from the said orders that the Apex Court had any where laid down or observed that ONGC was Secured Creditor. Referring to order dated 15/04/1987 it was submitted that what was given by the respondent Consumers before the Apex Court was only an undertaking and no charge was created in favour of ONGC : in the circumstances, ONGC could not claim to be a Secured Creditor. It was further submitted that order of 15/04/1987 has duly been considered in the subsequent judgment dated 12/04/2004 by the Apex Court and hence the earlier order of 1987 was no longer in existence.

12.4 That alternatively, if ONGC claimed that it was a Secured Creditor on the basis of various orders made at an earlier point of time by the Supreme Court, ONGC was required to seek a decision from the Supreme Court whether ONGC was or was not a Secured Creditor. That it was not open to this Court to decide this controversy, except decide the priority at the time of disbursement of the funds available with the Official Liquidator.

12.5 Alternatively, it was submitted that if ONGC was a Secured Creditor the Supreme Court would have categorically said so in its order of 12/04/2004 because the Supreme Court was alive to the dispute between the parties in light of the Review Petition moved by the Textile Labour Association. That the Supreme Court having not declared ONGC to be a Secured Creditor it was not open now for ONGC to make such a claim.

12.6 That under the provisions of the Act only two categories of Secured Creditors were envisaged: contractual and statutory; that the third category, which was now sought to be introduced by ONGC, namely, a Secured Creditor as declared by the Court, was not warranted in light of any statutory provision under the Act. He supported contentions raised by Mr.J.T.Trivedi and Mr.Vasavada that in absence of any charge or mortgage which are registered as required under the Act the undertaking said to have been filed by the erstwhile management of the Company in liquidation cannot be considered to be a charge/mortgage/lien on the basis of the orders of the Court and if at all there was any such charge in light of the undertaking the same was void considering the provisions of Section 125 of the Act.

12.7 By virtue of the earlier order dated 17/10/1997

made by the Apex Court in Review Application filed by the Official Liquidator ONGC was treated as having a preferential right, but now in light of subsequent order dated 12/04/2004 made by the Apex Court in the Review Application preferred by Textile Labour Association the said preferential right had also been taken away qua the Company in liquidation. Therefore, ONGC was no longer a preferential creditor but was only a creditor : at best a decree holder i.e. the judgment creditor.

13. The learned Addl. Advocate General in rejoinder submitted that the necessity to claim status of Secured Creditor arose only after the order of 12/04/2004 and prior thereto ONGC was not required to make such a claim; therefore, ONGC had not made a specific prayer in the application, but this being a legal submission ONGC must be permitted to raise the same. He reiterated his basic submission that in light of the various orders made by the Apex Court, and more particularly, order dated 15/04/1987, ONGC was required to be treated as a Secured Creditor in light of the undertaking filed by the then existing Company before the Apex Court.

14. The learned Addl. Advocate General is right in contending that prior to 12/04/2004 ONGC had no occasion to make claim as a Secured Creditor in light of the fact that by virtue of bunch of orders commencing from 15/04/1987 made by the Apex Court ONGC was under a belief that it had a preferential right at the time of disbursement of the funds of the Company in liquidation considering the decision rendered by the Apex Court in favour of the ONGC. Therefore, the Court has permitted ONGC to raise the said contention, especially in light of the fact that, ONGC specifically based its claim on various orders made by the Apex Court and did not want to lodge any claim before the Official Liquidator, as categorically stated at the Bar by learned Addl. Advocate General under instructions. According to the learned Addl. Advocate General, ONGC was already held to be entitled to recover its dues from the Company in liquidation in light of the fact that ONGC had established before the Apex Court that it had supplied goods for which it was entitled to charge at a higher rate and the Consumers having undertaken to discharge such a liability.

15. The contention that ONGC should be required to approach Supreme Court for resolving the issue : whether ONGC is, or is not a Secured Creditor sounds attractive. However, considering the fact that since more than a decade and half applications by workmen and Secured

Creditors seeking orders of disbursement of funds lying with the Official Liquidator are pending, it is necessary to decide the controversy so as to end the uncertainty. Even for determining priority inter-se between parties this was necessary.

16. Section 446 of the Act pertains to the powers and jurisdiction of the Company Court in relation to any suit or proceeding by or against the Company which is in liquidation. Under Section 446(1) of the Act when a winding up order has been made or the Official Liquidator has been appointed as a Provisional Liquidator, no suit or other legal proceedings, pending at the date of the order of winding up, can be proceeded against the Company in liquidation, except by leave of the Company Court. The law is well settled that the Company Court in winding up proceedings has jurisdiction, interalia, to entertain or dispose of any suit or proceedings by or against Company, even if such suit or proceedings had been instituted before an order of winding up had been made. The Court also has jurisdiction to transfer such a suit or proceeding to itself and dispose of the same. This is the position which emerges from a combined reading of sub-sections (2) & (3) of Section 446.

17. Therefore, once an order of winding up came to be made on 17/01/1997 in Company Petition No.121 of 1995 with Company Petition No.66 of 1998 and others, ONGC was required to either seek leave of the Company Court or obtain orders from the Company Court for the purpose of pursuing its legal remedies in relation to recovery of outstanding dues.

18. Section 529(1) of the Act states that in the winding up of a Company for the purpose of provable debts; the valuation of annuities etc.; and the respective rights of Secured and Unsecured Creditors same rules as are in force for the time being under the Law of Insolvency shall prevail and be observed. Therefore, whether ONGC is a Secured Creditor or an Unsecured Creditor, its rights will be governed by the Insolvency Rules as stipulated in Section 529 of the Act.

19. The Proviso under sub-section (1) of Section 529 of the Act clearly provides that the security of every Secured Creditor shall be deemed to be subject to a pari passu charge in favour of the Workmen to the extent of the Workmen's portion therein, and where a Secured Creditor instead of relinquishing its security opts to stay outside winding up and realise its security, to the extent of pari passu charge in favour of Workmen,

provision of Section 529A of the Act would come into play. But before that it must not be lost sight of the fact that the object of the provision is that the legitimate dues of the workers must rank pari passu with those of the Secured Creditors and above, even the dues of the Government. The reason being the Workmen put in their labour and contribute to the growth of capital of the Company and thus become legitimately entitled to seek a share in the assets of the Company when the Company faces its closure and distribution of the assets is undertaken. Thus, even if ONGC seeks to get itself treated as a Secured Creditor it will have to accept pari passu charge in favour of the Workmen to the extent of Workmen's portion. In light of the clear unambiguous and unequivocal language of the provisions the contention on behalf of the ONGC that it has a superior right even above the Secured Creditor requires to be negatived. In absence of any statutory provision no such right is available to any creditor once there are specific statutory provisions and rules providing for determination of entitlement of persons from the estate of an insolvent person.

20. The contention that ONGC has superior right in light of various orders of the Apex Court does not require elaborate discussion in light of what is laid down by the Apex Court in the case of Supreme Court Bar Association Vs. Union of India and Another, (1998) 4 SCC 409:

> "47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do

complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent 'clogging or obstruction of the stream of justice'. It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to 'supplant' substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz. to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice 'between the parties in any cause or matter pending before it'. The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by 'ironing out the creases' in a case or matter before it. Indeed this Court is not a Court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this

> Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a 'problem solver in the nebulous area' (See K.Veeraswami v. Union of India (1991) 3 SCC 655 :1991 SCC [Cri] 734) but the substantive statutory provision dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

Thus, even if it is accepted that the bunch of orders made by the Apex Court are under Article 142 of the Constitution the said orders cannot be read as having ignored any substantive statutory provisions dealing with the subject i.e. winding up of a Company in liquidation and hence also the claim made by ONGC is required to be tested in light of the provisions of the Act read with provisions of The Provincial Insolvency Act,1920.

21. The proviso to sub-section (1) of Section 529 has to be read along with the provisions of Section 529A(1)(b) of the Act which state that notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a Company - workmen's dues and debts due to Secured Creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with such dues shall be paid in priority to all other debts. In other words where a Secured Creditor keeps himself outside the winding up proceedings as stated in the Proviso to Section 529(1) of the Act and seeks to recover his dues from realisation of the security, if he loses part of his security towards workmen's dues,the Secured Creditor gets reimbursed to that extent as a Secured Creditor, with an overriding priority under Section 529-A(1)(b) of the Act. The amount taken away by the Liquidator from the realisation of the Security outside winding up by the Secured Creditor is permitted to be recovered or reimbursed out of the monies that may be realised at the instance of other Creditors and for such reimbursement the Secured Creditor gets priority over all other creditors. Therefore, what the Secured Creditor loses towards Workmen's portion out of his security can be claimed by

Secured Creditor as a secured amount with priority over other creditors out of other realisations made by other creditors when the Company Court directs disbursement of the funds. But at the same time, position of the Secured Creditor does not improve from what it was originally and the priority of the Secured Creditor would not extend to its entire unrealized sums which might be in excess of the value or the price realised from his security.

22 Therefore, even on this count ONGC cannot be permitted to seek priority over the Secured Creditors in light of the statutory Scheme laid down under Sections 529 read with 529A of the Act. Even if ONGC is to be treated as a Secured Creditor ONGC will have to first of all permit a pari passu charge to the extent of Workmen's portion from the realisation of its security and only thereafter, ONGC will be entitled to make a claim to the extent ONGC has given up the Workmen's portion from the amount realised from its security. In the present case there is nothing on record to show that ONGC has opted to stay outside winding up proceedings and realise its security. To the contrary, ONGC has approached the Court claiming entire outstanding dues without stating as to whether ONGC intends to relinquish its security and prove its debts as required under Section 529(1) of the Act. Thus, a peculiar situation arises wherein the applicant ONGC is neither ready and willing to relinquish its security nor is ready to opt to realise its security and on exercise of such an option permit the Official Liquidator to enforce pari passu charge in favour of the workmen to the extent of workmen's portion. In other words, ONGC would like the Company Court to permit ONGC to act beyond the provisions of the Act. If such exercise is not permissible for the Apex Court while exercising powers under Article 142 of the Constitution by no stretch of imagination can it be stated that the Company Court would have any such jurisdiction. Because the Apex Court exercises jurisdiction under Article 142 of the Constitution to do complete justice between the parties, and while doing so ordinarily cannot disregard a statutory provision governing a subject except for "ironing out the creases." Such powers cannot be exercised by this Court; even if permissible: the facts do not warrant it. The conflicting claims of Secured Creditors, other Creditors and the overriding statutory preference quay the workmen and ONGC have to be balanced.

23 In the case of A.P.State Financial Corporation Vs. Official Liquidator,(2000) 7 SCC 291 the Apex Court was called upon to decide as to whether the provision of Section 29 of State Financial Corporations Act,1951 can

override the provisions of Sections 529 & 529A of the Act. The contention raised on behalf of the appellant before the Apex Court was that the State Financial Corporations Act, 1951 being a Special Act, power of the Corporation to invoke provisions of Section 29 of the Act of 1951 was absolute and cannot be restricted by any other law. The Apex Court in no uncertain terms, after referring to Non obstante clause with which Section 529A of the Act opens, stated that "the above Proviso to sub-section (1) of Section 529 and Section 529-A will control Section 29 of the Act of 1951. In other words, the statutory right to sell the property under Section 29 of the Act of 1951 has to be exercised with the rights of pari passu charge to the workmen created by the Proviso to Section 529 of the Companies Act".

If the statutory provision in State Financial Corporations Act,1951 cannot prevail over provisions of the Companies Act, it is not possible to accept the contention raised on behalf of the applicant ONGC that it has any superior right on the basis of orders made by the Apex Court.

24 Considering the controversy between the parties if the matter is examined from a slightly different angle it becomes apparent that the entire bunch of orders in the compilation produced by ONGC and on which reliance has been placed are only in relation to the rights of the parties governed by the contract i.e. ONGC and its consumers. Neither the workmen nor the Secured Creditors were privy to the said contract. Thus, not being a party to the contract they were also not parties to the litigation between the contracting parties. In the circumstances, the Workmen and the Secured Creditors cannot be bound by the orders made in the said litigation. In fact when one reads the order of 12/04/2004 made by the Apex Court in the Case of Textile Labour Association (supra), it is apparent that the Supreme Court was not even aware that the consumer company was in liquidation and interests of Workmen and Secured Creditors were involved. Mr.J.T.Trivedi was therefore partly right in contending that the erstwhile Management of the Company in liquidation ought to have brought this fact to the notice of the Apex Court viz. that the properties were already under charge and further that winding up proceedings had commenced.

25. It is beyond pale of controversy that the Secured Creditors and the workmen have been conferred preferential statutory rights under Sections 529 and 529-A of the Act. The orders of the Apex Court, or for

that matter any Court, cannot be read so as to defeat such statutory rights, because :

(a) There can be no presumption that a Court would ignore a statutory provison on the subject, OR

(b) That a Court would pass orders against/overriding statutory provision (s), unless the very statutory provison(s) is/are under challenge and/or under consideration.

In the present, Sections 529 & 529-A of the Act were never under challenge or consideration, because neither Secured Creditors nor workmen were party to either proceedings - between ONGC and its consumers, or between Official Liquidator and ONGC. The legal maxim ACTUS CURIAE NEMINEM GRAVABIT would apply. This maxim which states that an act of a Court shall prejudice no man is founded upon justice and good sense, and affords a safe and certain guide for the administration of law.

26 The contention raised on behalf of the Workmen and the Secured Creditors that ONGC has failed to establish that it is in possession of a security over which a charge in favour of ONGC that has been created merits acceptance. The order of 15/04/1987 on which great reliance and emphasis was placed on behalf of ONGC is only an interim order. The said order only states that ONGC will not disconnect the supply of gas to various respondents before the Apex Court and will continue to supply gas @ Rs.1000/- per one thousand cubic metres "subject, however, to the undertaking by the respondents which has been given and has been accepted here, that the said respondents will not charge encumber or alienate, except with the leave of this Court, any of their immovable assets included in the respective undertakings and that they will make their immovable assets, available for discharging the respective liabilities on account of the difference in the price of all the gas supplied to and further during the pendency of the appeals as determined by order made by the Court while disposing of the appeals. The undertaking will be filed within four weeks".

27 On plain reading all that the aforesaid order can be read to mean is that the consumers will not charge and encumber or alienate any of the immovable assets except with the leave of the Apex Court and that they will make their immovable assets available for discharging the

respective liabilities on account of difference in the price of the gas supplied during pendency of the appeals as determined by order made by the Court while disposing of the appeals.

28 In the circumstances, ONGC was required to show that such an undertaking would amount to mortgage, charge or lien in the property considering definition of "Secured Creditor" under Section 2(e) of The Provincial Insolvency Act,1950. It is admittedly not a mortgage. In fact, no specific submissions as to whether such undertaking is a mortgage or a charge or a lien were advanced on behalf of ONGC. The question is if it is to be treated as a charge the same has to be specifically registered under Section 125 of the Act in absence of which the same would be void against Liquidator and any Creditor of the Company. ONGC has failed to show that there is an instrument by which the charge is created or evidenced and copy thereof verified in the prescribed manner has been filed with the Registrar of Companies for registration in the manner required by the Act within 30 days after the date of its creation. The Court exercising jurisdiction as a Company Court in winding up proceedings is bound by the provisions of the Act and the relevant rules. In the circumstances, it is not possible to state that ONGC has been able to establish that any charge was created in its favour and that such charge had been duly registered as required under the provisions of the Act so as to entitle ONGC to claim status of a Secured Creditor.

29 The only question that would survive is : would the undertaking amount to lien ? Lien depends upon possession. The Indian Contract Act, 1872 provides for Bailee's lien u/s.170; but bailee's right of lien is lost with the loss of possession. Under Section 171 of Contract Act General lien of bankers and others is provided for. General lien confers on lien holder the right to retain the goods until the payment is made. A banker's lien can properly arise only over things which belong to the customer but which are held by the bank as security. ONGC is neither a bailee nor does it fall in the category of a general lien-holder described u/S 171 of the Contract Act. ONGC is merely a seller of gas i.e.goods. Section 49 of The Sale of Goods Act, 1930 provides for situations in which lien gets terminated. The unpaid seller of goods loses his lien when he delivers the goods and the buyer obtains lawful possession. Hence "when the vendor has given the buyer possession under the contract of sale, all his rights in

the goods are completely gone; he must recover the price exactly as he would recover any other debt (u), and has no longer any claims on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent unless, indeed, the whole transaction is vitiated by actual fraud"(v)." Source : Pollock & Mulla - The Sale of Goods Act, Fifth Edition.

30. Therefore, ONGC having failed to establish any lien it cannot be treated as a Secured Creditor even on this count. The dictionary meanings on which reliance is placed are either in context of the Bankruptcy Act or the Provincial Insolvency Act, and hence again in context of the three terms : mortgage, charge, lien, which have already been examined hereinbefore.

31. Once ONGC is held to be not a Secured Creditor it will have to make its claim in accordance with the provisions of the Act as applicable to other Creditors and cannot seek any preferential treatment. To sum-up ONGC is not entitled to seek a position superior to that of Secured Creditors nor is ONGC a Secured Creditor in light of the facts and circumstances available on record.

32. All the learned Advocates appearing on behalf of the respective parties have placed heavy reliance on the judgment rendered on 12/04/2004 in the case of Textile Labour Association (supra) with special reference to paragraph nos. 7 to 11 which read as under :

"7. It is next contended that inasmuch as mandamus had been issued by this Court as to priority of claims in the matter of payment that mandamus will prevail over any law. This Court examined the plenary powers of this Court arising under Article 142 of the Constitution of India in Supreme Court Bar Assn. v. Union of India and held that: (6 [1998]4 SCC 409)

'This Court in exercise of its power under Article 142 cannot ignore any substantive statutory provision dealing with the subject and it is only a residuary power, supplementary and complementary to the powers specifically conferred on this

> Court by statutes, exercisable to do complete justice between the parties whereever it is just and equitable to do so. It is intended to prevent any obstruction to the stream of justice.'

Though the order of this Court in respect of which review is sought for may be read as having been made pursuant to exercise of powers under Article 142 of the Constitution, still the same will have to be read in the light of the decision of this Court in Supreme Court Bar Assn. v. Union of India.

8. The effect of Sections 529 and 529-A is that the workmen of the company become secured creditors by operation of law to the extent of the workmen's dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become unsecured preferential creditors under Section 529-A to the extent of the workmen's dues. The purpose of Section 529-A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company would remain charged for the payment of the workers' dues and such charge will be pari passu with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529-A. This section overrides preferential claims under Section 530 also. Under Section 529-A the dues of the workers and debts due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.

9. Therefore, the law is clear on the matter as held in UCO Bank case that Section 529-A will override all other claims of other creditors even where a decree has been passed by a court.

10. Therefore, claims, if any, of ONGC will have to be worked out in accordance with Sections 529 and 529-A of the Companies Act as well. The contention advanced on behalf of ONGC by Shri Raju Ramachandran that if a mandamus had been issued, it will prevail over any law is not tenable and is rejected.

11. In the result, we make it clear that order made by this Court on 17-10-1997 in IAs Nos.168-78 of 1997 in Civil Appeals Nos.8530-40 of 1983 will have to be read subject to provisions of Sections 529 and 529-A of the Companies Act".

33. The dispute between the parties is in relation to reading of paragraphs Nos.10 and 11 quoted above. It is stated on behalf of the ONGC that the first sentence of paragraph No.10 which states that the claims of ONGC will have to be worked out in accordance with Sections 529 & 529-A of the Companies Act as well denotes that so far as ONGC is concerned the applicability of provisions of Sections 529 & 529-A of the Act is only for the purpose of working out the claim which otherwise stands crystallized and indication for this submission is found from the use of the words "as well". It is further submitted that in paragraph No.11 the Apex Court has merely stated that the order made by it on 17/10/1997 will have to be read subject to provisions of Sections 529 & 529-A of the Act, and hence the submission goes, that the order dated 17/10/1997 is neither recalled nor set aside and only observation is to the effect that the said order is to be read subject to provisions of Sections 529 & 529-A of the Act. The learned Advocates appearing for the Secured Creditors and the Workmen have disputed these submissions stating that the order is required to be read as a whole and if that is done, it is clear that the Apex Court has given go bye to the preferential status accorded to ONGC by the earlier order.

34. The order of 17/10/1997 has already been reproduced hereinbefore. While disposing of the Review Application filed by the Official Liquidator the Apex Court stated that out of the assets of the Company under liquidation the dues of ONGC Ltd. are required to be paid off first and the question of making any payment to any other Creditor can arise only out of the surplus, if any, remaining after the full dues of ONGC have been paid off. The Review Applications moved by the Textile Labour

Association (supra) were primarily on the ground that they were not party to the proceedings before the Apex Court and on passing of the winding up order provisions of the Companies Act would come into force and will be effective in light of the settled legal position. The Review Petitions were resisted on behalf of ONGC raising two fold contentions : firstly, that the Review Applications were barred by limitation and were not filed with due diligence, and secondly, once mandamus had been issued by the Apex Court as to priority of claims in the matter of payment that mandamus will prevail over any law.

35. The Apex Court in paragraph No.7 has categorically stated that though the earlier order of 17/10/1997 may be read as having been made pursuant to the exercise of powers under Article 142 of the Constitution, yet the same will have to be read in light of the pronouncement of law in the case of Supreme Court Bar Association Vs. Union of India (supra). After stating thus in paragraph No.7 the contention regarding mandamus raised on behalf of ONGC is rejected specifically in paragraph No.10.

36. In paragraph No.8 of the judgment the Apex Court has very succinctly analysed the provisions of Sections 529 & 529-A of the Act. However, the later portion of the said paragraph gives the indication as to how the Apex Court has considered the rival claims. It is stated that there is no other statutory provision overriding the claim of the Secured Creditors except Section 529-A and that the said Section overrides preferential claims under Section 530 also. That under Section 529A the dues of the workers and debts due to the Secured Creditors are to be treated pari passu and have to be treated as prior to all other dues. This position is reiterated after referring to the earlier decision in case of UCO Bank Vs. Official Liquidator (1994) 5 SCC 1, and it is stated that Section 529-A will override all other claims of other Creditors even where a decree has been passed by a Court. The subsequent paragraph begins with the word 'Therefore' and sentence goes on to state that claims, if any, of ONGC will have to be worked out in accordance with Sections 529 & 529-A of the Companies Act as well. This sentence is followed by rejection of the contention on behalf of the ONGC that the mandamus issued earlier in point of time will prevail over any other law.

37. Hence, it becomes clear that the Apex Court states that the claim under Section 529-A of the Workmen and the Secured Creditors would override such

preferential claim under Section 530, even if the claim of ONGC is treated as preferential claim under Section 530. As a consequence the claims of ONGC are to be worked out in accordance with Sections 529 & 529-A of the Act and the use of the words "as well" denotes that the same will fall in the category of all other claims of other Creditors even where a decree has been passed by the Court. In the conclusion when the Apex Court observed that the order of 17/10/1997 will have to be read subject to provisions of Sections 529 & 529-A of the Act, it only means that as first step the Secured Creditors will have to exercise the option as envisaged under Section 529 of the Act; as second step in case the Secured Creditors opt to stay out of winding up the Official Liquidator will enforce the pari passu charge to the extent of Workmen's portion; as third step the Secured Creditors would be entitled to stake a claim in priority by virtue of provisions of Section 529A(1)(b) of the Act and the last step would be : all other claims of other Creditors, including decree holders, would be required to be discharged subject to availability of the funds.

38. If what ONGC contends is the law flowing from various orders of the Apex Court - that ONGC is a Secured Creditor, or has a preference quay all other claimants i.e. Secured Creditors and workmen - in the order dated 12/4/2004 in case of Textile Labour Association (Supra) the Apex Court would have made such a declaration, instead of the statement that claims, if any, of ONGC will have to be processed in light of provisions of Sections 529 and 529-A of the Act.

39. ONGC therefore cannot claim any preferential right on the basis of the order of 17/10/1997 in priority to the Secured Creditors and the Workmen taking into consideration the provisions of Sections 529 & 529-A of the Act. Such preferential claim, if falling under Section 530 of the Act would follow the claims of Secured Creditors and the Workmen under Sections 529 & 529-A of the Act. In case the claim of ONGC is not proved to be preferential under Section 530 of the Act they would thereafter fall for consideration alongwith all other claims of other Creditors as ONGC, on its own saying, is a decree holder.

40 In view of what is stated hereinbefore this application cannot be granted at this stage, i.e. before claims of Secured Creditors and workmen are processed under Sections 529 & 529-A of the Act. Despite categorical statement at the Bar, under instructions,

that ONGC did not want to lodge any claim before the Official Liquidator, it will be open to ONGC to lodge its claim in accordance with law and seek its satisfaction when claims of other Creditors of the Company in liquidation are taken up for consideration for distribution of the funds which may be available at that time. The application is accordingly rejected. Notice is discharged.

(D.A.Mehta,J)

41 At this stage Mr.Thakar for M/s. Trivedi and Gupta and Mr.A.R.Mehta, learned advocates appearing for the applicant - ONGC, pray that the operation of the order be stayed to the effect that there may be no disbursement of funds for a period of 10 (ten) weeks from today. In light of the facts which are available on record, it is not possible to accept the request and hence, the same stands rejected.

(D.A.Mehta,J)
m.m.bhatt